No. 17-204

IN THE
Supreme Court of the United States

APPLE INC.,
Petitioner,

v.

ROBERT PEPPER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ANTITRUST SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF ANTITRUST SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are leading scholars with decades of experience in antitrust law and economics. They have studied and written numerous articles, book chapters, and other papers about *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977); or other significant anti-

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[1] No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; and no person other than *amici* and their counsel made such a contribution. Letters consenting to the filing of this brief have been filed with the Clerk.

trust cases, as well as the policy effects of those decisions on markets. *Amici* thus have a strong interest in the sound development of antitrust law.

Joseph P. Bauer is a Professor Emeritus of Law at Notre Dame Law School. An expert in the field of antitrust, Professor Bauer is the co-author of the Kintner and Bauer *Federal Antitrust Law* treatise. He is a member of the Advisory Board of the American Antitrust Institute, and he has served as a consultant to the Federal Trade Commission's Bureau of Competition and as a member of the Association of American Law Schools' Antitrust Section Executive Committee. Professor Bauer has testified on numerous occasions before Senate and House committees and subcommittees and in judicial proceedings.

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Tim Wu is the Silver Professor of Law, Science, and Technology at Columbia Law School. He is a leading scholar in the fields of antitrust, intellectual property, and communications law. In addition to his scholarship,

Professor Wu has served as an advisor to the Federal Trade Commission and the White House National Economic Council.

Amici respectfully submit this brief to emphasize the important policy ramifications of the issues presented. The views expressed are those of the individual *amici* and not of their affiliated organizations.

SUMMARY OF ARGUMENT

For over forty years, this Court's decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), has prohibited indirect purchasers—*i.e.*, those who do not transact directly with an alleged antitrust violator—from bringing treble-damages suits under the Clayton Act. Petitioner seeks a novel expansion of that rule. In petitioner's view, even those who buy goods or services directly from an antitrust violator should not be permitted to sue that violator for damages if a third party had some role in setting the price they paid. That expansion would unduly restrict private treble-damages actions—a key element of the enforcement regime Congress designed.

I. The Sherman Act created a private right of action allowing parties injured by violations to sue for treble damages. The Clayton Act contains a similar provision. Those provisions reflect Congress's intent that private actions would form a central component of enforcement of the antitrust laws. In keeping with that design, private parties file the vast majority of antitrust actions.

Maintaining robust private enforcement of the antitrust laws is even more important in the current market. The last several decades have seen rising concentration—and decreasing competition—across nearly all industries, creating opportunities for abuse of market power and antitrust violations. The markets in which Apple

participates are no exception: The mobile app, smartphone, personal computing, operating system, and mobile operating system markets are all highly concentrated, with Apple holding significant market share.

II. Petitioner's proposed expansion of *Illinois Brick* threatens the private enforcement regime Congress designed. This Court has long emphasized the importance of ensuring that *some* party with an incentive to sue is able to seek enforcement of the antitrust laws. Those concerns are justified: The number of parties with incentives to sue monopolists like Apple is already limited. Some commercial purchasers fear disrupting vital supply relationships. Others have no economic incentive to sue because antitrust violators share monopoly profits with them. Expanding the direct-purchaser rule as petitioner suggests would further limit the pool of potential plaintiffs, threatening to eliminate private enforcement altogether for certain violations.

Petitioner's rule would also draw arbitrary distinctions between direct purchasers. Petitioner claims that *Illinois Brick* requires the selection of *one* appropriate plaintiff. But this Court has never announced such a rule. Court after court has recognized that, where an antitrust violator directly harms multiple parties in different markets, each victim may be a direct purchaser who may sue for the distinct harm it suffered. Arbitrarily excluding one set of direct purchasers threatens underdeterrence in an era when multisided markets are increasingly common.

Petitioner's theory would further undermine enforcement by permitting monopolists and cartelists to avoid liability through clever transaction structuring. Economically identical transactions could be recast to vest sole "direct purchaser" status in the party least likely to sue.

Retaining this Court's bright-line *Illinois Brick* rule—in which any party that transacts directly with an antitrust violator may sue for damages—would avoid such gamesmanship.

III. Expanding *Illinois Brick* as petitioner requests would make even less sense in light of developments over the intervening decades. This Court adopted the direct-purchaser rule based on perceived difficulties in apportioning overcharges and the potential for duplicative recoveries. But over the decades since, state law has evolved to permit indirect-purchaser actions that are barred under federal law, and those cases are routinely heard in federal court. Courts will thus confront such issues regardless of what the Court decides in this case.

Advances in economic analysis also mitigate many of the Court's concerns in *Illinois Brick*. That decision sought to simplify damages calculations in light of the primitive state of econometric methodology at the time. But advances in econometrics over the last forty years have made it relatively straightforward for economists to determine antitrust damages in complex commercial environments where multiple parties interact. Courts routinely apply those methods of calculating damages without significant difficulty. For that reason too, there is no justification for further expanding *Illinois Brick*.

ARGUMENT

This private antitrust suit falls squarely within the traditional class of direct-purchaser actions permitted by *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). Petitioner acknowledges that "Apple distributes"—*i.e.*, sells—"apps 'directly' to consumers via the App Store." Pet. Br. 34. But petitioner nonetheless asserts that those customers are not direct purchasers for purposes of *Illinois Brick* because—contrary to the well-accepted inter-

pretation of that decision—the immediate buyer of a product does not qualify as a direct purchaser if a third party is "setting the price." *Id.* at 37. According to petitioner, because developers rather than Apple set the price for apps in the App Store, the customers who buy those apps directly from Apple are not direct purchasers and therefore cannot seek damages for Apple's anticompetitive conduct. See *id.* at 37-38.

The rule that petitioner seeks is not an interpretation of *Illinois Brick* but an expansion of it. Petitioner invites the Court to adopt a rule that certain consumers, although direct purchasers, cannot sue for damages if a third party was involved in setting the price for the product. That extension of *Illinois Brick* would severely limit the pool of potential private enforcers and, in many cases, eliminate private enforcement altogether.

I. HEALTHY MARKET COMPETITION DEPENDS ON PRIVATE ANTITRUST ENFORCEMENT

A. Private Actions Are Crucial to Successful Enforcement of the Antitrust Laws

From the outset, Congress designed the antitrust laws to rely on private enforcement to deter anticompetitive behavior. As originally enacted, the Sherman Act provided that any person "injured in his business or property" by a violation could "sue therefor * * * and shall recover threefold the damages by him sustained, and the costs of suit." An Act To Protect Trade and Commerce Against Unlawful Restraints and Monopolies, § 7, 26 Stat. 209, 210 (1890). That provision now appears as Section 4 of the Clayton Act, while Section 5 expressly grants preclusive effects in private actions to prior judgments obtained by the United States. See Clayton Antitrust Act of 1914, Pub. L. No. 63-212, §§ 4, 5, 38 Stat. 730, 731 (codified at 15 U.S.C. §§ 15(a), 16(a)).

The antitrust laws thus seek to promote competition by creating a two-track enforcement regime, with private actions "supplement[ing] public enforcement, which is inevitably selective." 2A Phillip E. Areeda & Herbert Hovenkamp, *et al.*, *Antitrust Law* ¶330b, at 41 (4th ed. 2014); see also 1 Earl W. Kintner & Joseph P. Bauer, *et al.*, *Federal Antitrust Law* §4.18, at 241-242 (1980) (Sherman Act "surpassed the common law" by creating a private right of action for treble damages). "The interest in wide and effective enforcement has * * *, for [over] a century, been vindicated by enlisting the assistance of 'private Attorneys General,'" and this Court has "always attached special importance to their role because 'every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress.'" *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 653-654 (1985) (alteration omitted) (quoting *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972)); see also *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("[T]he leading proponents of the legislation perceived the treble-damages remedy * * * as a means of protecting consumers * * *."); *Ill. Brick*, 431 U.S. at 745 (noting the "longstanding policy of encouraging vigorous private enforcement of the antitrust laws").

Private enforcement is crucial "not merely to provide private relief" to injured consumers but also "to serve * * * the high purpose of enforcing the antitrust laws." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-131 (1969); see William Breit & Kenneth G. Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & Econ. 329, 329 (1974) (private enforcement actions are "the strongest pillar" and "foundation" of antitrust law (quotation marks omitted)). While government regulators

may seek to enjoin antitrust violations, only private parties may seek treble damages. See 15 U.S.C. §§ 15(a), 15a. That remedy is critical to ensuring adequate deterrence. By "generat[ing] a powerful financial incentive for injured persons to detect, disclose, attack, and end violations of the antitrust laws," the threat of treble damages "offset[s] the probability that a secret violation may not be detected and prosecuted." 2A Areeda & Hovenkamp, *supra*, ¶330b, at 40-41.

Indeed, absent the threat of treble damages, defendants would often have strong incentives to violate the antitrust laws and simply pay any penalty imposed. "For example, if damages for cartel price fixing were limited to the overcharge, prospective cartel members would think it profitable to enter the cartel if there is any substantial likelihood that they would not be caught," because, "[a]t worst, they would merely have to pay back the cartel's illegal earnings." 2A Areeda & Hovenkamp, *supra*, ¶330b, at 40.[2]

Private parties are also more likely than the government to have information about antitrust violations, and are thus in a better position to detect violations. See *Paper Sys. Inc.* v. *Nippon Paper Indus. Co.*, 281 F.3d 629, 632-633 (7th Cir. 2002) (allowing private plaintiffs "to collect the full overcharge, trebled, creates powerful incentives to investigate and file suit" because "[f]irms that deal directly with * * * manufacturers are apt to know the most about the industry's behavior and thus are in

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[2] Preserving effective private enforcement is especially important in price-fixing cases—the core of anticompetitive conduct and the context in which *Illinois Brick* arose. Even antitrust skeptics agree that the *per se* rule against price-fixing has made "enormous" "contributions to consumer welfare over the decades." Robert H. Bork, *The Antitrust Paradox* 263 (2d ed. 1993).

the best position to detect cartels"); Steven Shavell, *Foundations of Economic Analysis of Law* 578-581 (2004) (discussing government and private incentives to sue in tort-litigation context). "Private enforcement thus increases the likelihood that a violator will be found out, and greatly enlarges the penalties and thereby helps discourage illegal conduct." 2A Areeda & Hovenkamp, *supra*, ¶330b, at 41.

Consistent with Congress's two-track enforcement structure, today most antitrust enforcement actions are brought by private parties rather than regulators. Private litigation accounted for about 90% of antitrust filings in federal court each year between 1975 and 2012. See Hindelang Criminal Justice Research Ctr., Univ. at Albany, *Sourcebook of Criminal Justice Statistics Online: Antitrust Cases Filed in U.S. District Courts* (2012), https://www.albany.edu/sourcebook/pdf/t5412012.pdf; compare U.S. Courts, *Table C-2A*, http://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2017.pdf (approximately 650-700 civil antitrust cases filed in federal courts per year from 2013 to 2017), with U.S. Dep't of Justice, *Antitrust Div. Workload Statistics FY 2008-2017*, at 5-6, https://www.justice.gov/atr/file/788426/download (approximately 40-110 civil and criminal cases filed by DOJ Antitrust Division per year from 2008 to 2017).

Empirical studies have confirmed that those private enforcement actions are effective in deterring anticompetitive behavior. See, *e.g.*, Robert H. Lande, *et al.*, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879, 893-894 (2008) ("[P]rivate litigation provides more than four times the deterrence of the criminal fines * * *."). That result is unsurprising. As this Court has explained, government

regulators may obtain only "one injunction" against a violator. *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S. 251, 261 (1972). But "[t]he position of a defendant faced with numerous claims for damages is much different." *Ibid.*[3]

B. Private Actions Are Particularly Important in Light of Increasing Market Concentration

Rigorous private enforcement is all the more important today because of increasing concentration across a wide variety of industries. Recent studies provide strong evidence that the American economy has become significantly less competitive.

From 1997 to 2014, the average Herfindahl-Hirschman Index ("HHI"), a measure of market concentration, increased from just under 800 to almost 1200—a nearly 50% increase. Gustavo Grullon, *et al.*, *Are U.S. Industries Becoming More Concentrated?* 8-9, 48 (Social Science Research Network, Working Paper, June 2018). HHI increased in 80% of all industries, and in some, the increase was massive. See *id.* at 11.

The markets in which Apple transacts are no exception. The mobile app store market appears to be a duo-

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[3] Concerns that private antitrust actions lead to excessive damages, overdeter, or duplicate government actions are unfounded. The most careful research suggests the opposite: Plaintiffs are normally *under*compensated. See, *e.g.*, John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997, 1998 (2015) (finding that most victims receive damages *less* than the overcharge). Conversely, statistical evidence shows that government agencies have underenforced antitrust laws by failing to block mergers that proved to have anticompetitive effects. See Carl Shapiro, *Antitrust in a Time of Populism*, Int'l J. Indus. Org., at 25 (forthcoming 2018) (observing that there is "little evidence that mergers increase efficiency through rationalization of production across plants or through savings in administrative costs" despite agency enforcement).

poly occupied by Apple and Google, and with respect to iPhone owners who seek to purchase apps, Apple's app store is effectively a monopoly. The smartphone market is dominated by only six manufacturers, including Apple. Eighty percent of the U.S. market for personal computers is shared by five firms, including Apple. Apple and Microsoft share approximately ninety percent of the U.S market for computer operating systems. And Apple and Google share virtually 100% of the U.S. market for mobile operating systems.[4]

Other measures confirm the reduction in competition. "Markups"—the amount by which a firm sets prices above marginal cost—have risen precipitously. From 1980 to 2014, the average markup across the United States economy nearly quadrupled from 18% to 67%. See Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 23687, Aug. 2017). In that environment, the need for effective private enforcement is even more acute.

II. Extending *Illinois Brick* To Bar Suits By Certain Direct Purchasers Would Cripple Private Antitrust Enforcement

Given the importance of private antitrust actions in Congress's enforcement scheme and the increasing threat of market concentration, it is all the more important to secure effective remedies for injured consumers. Petitioner's theory, however, would have precisely the opposite effect: By arbitrarily treating certain direct

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[4] The data in this paragraph is from Statistica, an analytics software package that provides market research information. See Statistica, www.statistica.com (last visited Sept. 25, 2018).

purchasers as if they were indirect purchasers, it would seriously undermine effective enforcement.

A. Petitioner's Proposed Rule Would Threaten To Eliminate Enforcement by the Only Parties with Incentives To Sue

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), this Court expressed concern that antitrust violators could "retain the fruits of their illegality" if "no one was available who would bring suit against them." *Id.* at 494. The Court was so concerned with preserving the effectiveness of private actions that it was willing to allow direct purchasers to sue for the entire overcharge despite the possibility that they might have passed on a portion to their customers. See *id.* at 488, 494.

In *Illinois Brick*, the Court recognized that "direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers," although it concluded "on balance" that vesting the entire damages remedy in direct purchasers would encourage vigorous enforcement. 431 U.S. at 746. In striking that balance, the Court remained "concerned not merely that direct purchasers have sufficient incentive to bring suit under the antitrust laws * * * but rather that at least *some party* have sufficient incentive to bring suit." *California* v. *ARC Am. Corp.*, 490 U.S. 93, 102 n.6 (1989) (emphasis added) (describing *Illinois Brick*); see *Ill. Brick*, 431 U.S. at 745-746 ("[T]he longstanding policy of encouraging vigorous private enforcement of the antitrust laws supports our adherence to the *Hanover Shoe* rule, under which direct purchasers * * * are permitted to recover the full amount of the overcharge." (citation omitted)).

Those concerns were well-founded. Many direct purchasers are "highly unlikely to sue" because they think they would be better off permitting an antitrust violation to continue rather than risking their relationship with the alleged violator. Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 Harv. L. Rev. 917, 941 (2003). Where an upstream party has market power—always the case with a monopolist—its customers may have "few, if any, alternative sources of supply," and will thus be "reluctant to risk their relationships with suppliers by initiating major antitrust litigation against them." Andrew I. Gavil, *Thinking Outside the* Illinois Brick *Box: A Proposal for Reform*, 76 Antitrust L.J. 167, 192 (2009). By artificially narrowing the class of direct purchasers, petitioner's rule would seriously aggravate those concerns.

Petitioner asserts that it is "highly unlikely" that "developers may be afraid to sue Apple." Pet. Br. 32 n.13. But experience suggests the opposite. In *Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), for example, after the Eighth Circuit dismissed a suit by concert-ticket purchasers on grounds similar to those petitioner advances here, the concert venues never sued Ticketmaster. See Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. Pitt. L. Rev. 437, 447 (2001) ("The consequence of the Eighth Circuit's holding was that the only private parties who had any incentive to bring a lawsuit, and any basis for asserting that they were harmed, were barred from bringing a treble damage action."). Other examples abound. See, *e.g.*, Mem. from the Antitrust Modernization Comm'n Staff to All Comm'rs 13 (May 4, 2006), https://govinfo.library.unt.edu/amc/pdf/meetings/CivRem-IndP_DiscMemo060504-fin.pdf (citing cases brought by indirect purchasers where

no direct purchaser or government agency sued); Am. Antitrust Inst., *Comments of the American Antitrust Institute Working Group on Remedies to the Antitrust Modernization Commission* 19 (June 17, 2005), https://govinfo.library.unt.edu/amc/public_studies_fr28902/remedies_pdf/AAI_Remedies.pdf (discussing another case in which "no direct purchaser * * * ha[d] sued in the two years since the case was filed by indirect purchasers"); see also Gavil, *supra*, at 191 n.73 (similar).

Moreover, whether or not developers would "fear" bringing a lawsuit, a monopolist like Apple can remove any incentive to sue simply by sharing a portion of the monopoly profits. See Barak D. Richman & Christopher R. Murray, *Rebuilding* Illinois Brick*: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. Cal. L. Rev. 69, 94 (2007). "[A]n upstream cartel can prevent private litigation as long as it assures that its direct purchasers downstream benefit more from the existence of the cartel than they can claim antitrust damages for," so that "[t]he cartel is effectively shielded from exposure through private litigation * * *." Maarten Pieter Schinkel, *et al.*, *Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion*, 39 RAND J. Econ. 683, 684-685 (2008). The benefits from acquiescing in a monopolist's conduct may be particularly easy to accept when the purchaser can simply foist off any overcharges on another party to the transaction. See Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of* Illinois Brick *in Modern Antitrust Standing Analysis*, 68 Geo. Wash. L. Rev. 1, 33 (1999) (direct purchaser's motivation to sue can depend on ability to pass on overcharge).[5]

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[5] Courts have held that *Illinois Brick* does not bar suits by indirect purchasers where "the manufacturer and the intermediary are both alleged to be co-conspirators." *Fontana Aviation, Inc.* v. *Cessna*

Monopolists, for example, can ration sales among purchasers, creating artificial scarcity and allowing favored purchasers to reap some of the monopoly profits through higher prices. See Schinkel, *et al.*, *supra*, at 685. Economists have suggested that De Beers used just such a rationing system to insulate itself from price-fixing liability, "offer[ing] sorted bundles of rough diamonds to a small group of selected clients" who would then process and resell those diamonds. *Id.* at 695. No private party filed an antitrust case against De Beers until after the Department of Justice brought its own case. See *ibid.*

Microsoft's agreements with purchasers likewise allowed it to maintain its monopoly on Intel-compatible operating systems. See *United States* v. *Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (affirming finding that Microsoft illegally maintained monopoly). The main direct purchasers of those operating systems were computer original-equipment manufacturers, who had "complex, ongoing relationship[s] with Microsoft," Hovenkamp, *supra*, at 941, and lacked alternative suppliers, see Ramona Mateiu, In re Microsoft Corp. Antitrust Litigation, 17 Berkeley Tech. L.J. 295, 307-308 (2002). In exchange for agreeing to exclusionary provisions in their contracts with Microsoft, the manufacturers "received various benefits, including discounts, cooperation in development, and greatly enhanced computer sales via the continuous

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Aircraft Co., 617 F.2d 478, 481 (7th Cir. 1980); see also *Lowell* v. *Am. Cyanamid Co.*, 177 F.3d 1228, 1232 (11th Cir. 1999) ("*Illinois Brick* does not apply to a single vertical conspiracy where the plaintiff has purchased directly from a conspiring party in the chain of distribution."); *Arizona* v. *Shamrock Foods Co.*, 729 F.2d 1208, 1212-1213 (9th Cir. 1984) (similar). But monopolists can discourage suits by sharing benefits from the illegal behavior with their counterparties without expressly colluding with them. See Schinkel, *et al.*, *supra*, at 685.

upgrading" demanded by Microsoft's hardware requirements. 2A Areeda & Hovenkamp, *supra*, ¶346f, at 196; see also *Dickson* v. *Microsoft Corp.*, 309 F.3d 193, 222 (4th Cir. 2002) (Gregory, J., dissenting) (noting allegations that "Microsoft shared some of the monopoly profits with the [original-equipment manufacturers]"). Unsurprisingly, even after a successful government enforcement action, no original-equipment manufacturer sued Microsoft. See *In re Microsoft Corp. Antitrust Litig.*, 218 F.R.D. 449, 451 (D. Md. 2003); 2A Areeda & Hovenkamp, *supra*, ¶346f, at 196 n.46. One manufacturer even urged Texas *not* to join the federal government's case. See Mateiu, *supra*, at 309 n.115.

By stretching *Illinois Brick* so it blocks damages suits by large categories of injured consumers despite the fact that they are direct purchasers, petitioner's rule would seriously aggravate the problem of insulating antitrust violations from liability because no party would have an incentive to sue.

B. Petitioner's Proposed Rule Would Create Arbitrary Distinctions Among Direct Purchasers

Petitioner's rule would also lead to arbitrary distinctions. It would allow *certain* direct purchasers to pursue a claim while denying any remedy to *other* direct purchasers, without any adequate justification for the disparate treatment.

As petitioner acknowledges, the App Store is a two-sided platform that sells to two different markets. See Pet. Br. 7-8 ("Apple structured the App Store as a[ ] * * * two-sided marketplace for connecting developers and consumers."). Apple sells distribution services upstream to developers, and it sells apps downstream to consumers. Respondents are suing with respect to the *downstream* overcharge; they are not seeking damages for any

upstream overcharge that developers may pass on to consumers. The fact that both overcharges may be reflected in the ultimate price, and that this price is set by the developer, is irrelevant to consumers' status as direct purchasers under *Illinois Brick*.

Petitioner claims that *Illinois Brick* requires courts to find the "*one* appropriate plaintiff group among the categories of possible plaintiffs." Pet. Br. 32. But *Illinois Brick* has no such requirement. Multiple plaintiffs or groups of plaintiffs may sue antitrust violators so long as they are all direct purchasers.

Courts have repeatedly held that, where multiple parties transact with the antitrust violator in different markets (for example, both upstream and downstream), there can be multiple direct purchasers. See, *e.g.*, *Loeb Indus., Inc.* v. *Sumitomo Corp.*, 306 F.3d 469, 481 (7th Cir. 2002) ("[D]ifferent injuries in distinct markets may be inflicted by a single antitrust conspiracy * * * ."); *In re Mercedes-Benz Anti-Trust Litig.*, 364 F. Supp. 2d 468, 482 (D.N.J. 2005) (lessees and leasing companies could both sue car dealerships for artificially inflating prices of leased vehicles, but for different damages); see also *Blue Cross & Blue Shield United of Wis.* v. *Marshfield Clinic*, 65 F.3d 1406, 1414 (7th Cir. 1995) (affirming judgment in favor of insurance company that paid providers while noting that, if patients were the ones who paid the fees, they would be the ones who could sue); *Med. Sav. Ins. Co.* v. *HCA, Inc.*, No. 2:04-CV-156, 2005 WL 1528666, at *8 (M.D. Fla. Jun. 24, 2005) (patients were "direct purchasers" because they paid overcharges to healthcare provider, even though insurers also paid portion of bill).

Illinois Brick applies only where "Party A, the antitrust violator, sells to Party B, and then Party C, a downstream purchaser from B, seeks to recover the implicit

overcharges that B passed on to C." *Loeb Indus.*, 306 F.3d at 482. If Party A sells most of its widgets directly to Party B for retail distribution, but also sells some widgets directly to consumers (Party C), *both* parties would be direct purchasers entitled to sue for their own distinct injuries. Nothing in *Illinois Brick* permits a court to pick only "*one*" of those direct purchasers and deem that party the "appropriate plaintiff." Pet. Br. 32.

That developers rather than Apple may set the price for apps is not an adequate justification for depriving consumers of their right to sue for damages. Whether or not Apple participates in the pricing decision (for example, by requiring all prices for apps to end in ".99"), consumers are still harmed when they purchase an app directly from Apple at a price that has been inflated by Apple's own anticompetitive conduct. The damages remedy is compensation for the harm that consumers suffered as a result of Apple's antitrust violations. There is no reason why that compensation should depend on the precise mechanism by which the anticompetitive price was set.

Arbitrarily excluding certain direct purchasers from the damages remedy, moreover, would result in underdeterrence. Congress imposed a treble-damages remedy to ensure a strong disincentive for antitrust violations. If a violator was required to compensate only *some* of the direct purchasers harmed by its violations, it would face liability less than three times the total damage it caused, impairing the deterrent effect of the remedy. For that reason too, allowing only a *subset* of direct purchasers to sue Apple for the anticompetitive harm it caused would be contrary to Congress's design.

C. Extending *Illinois Brick* Would Enable Monopolists To Manipulate Transactions To Avoid Liability

Petitioner's theory would not only undermine enforcement by diluting the effectiveness of the treble-damages remedy. It would also enable violators to avoid liability altogether by structuring their transactions in ways that exploit the proposed rule.

Suppose, for example, that a manufacturer sold widgets to retailers, which in turn resold them to consumers. If the retailers colluded amongst themselves to fix prices, the consumers could sue the retailers to seek compensation for any overcharges they paid. The consumers would be direct purchasers of the retailers, and thus the suit would be permitted by *Illinois Brick*.

Under petitioner's theory, however, nothing would prevent the retailers from avoiding liability simply by restructuring the form of the transactions. Instead of purchasing widgets from the manufacturer, the retailers could claim they were providing "distribution services" to the manufacturer. On that theory, the consumers would be only indirect purchasers, and any suit would be barred by *Illinois Brick*.

The retailers would not even have to change the economic substance of the relationship to advance such an argument. In the ordinary case, the retailer might pay the manufacturer $10 for the widget and then resell it for $13. If the retailer wanted to recharacterize the transaction as a sale of "distribution services," it could collect $13 from the consumer, return $10 to the manufacturer, and keep the $3 difference as its fee for distribution services. The economic substance would be the same. Yet the retailers could pick whether they wanted the manufacturer or the consumer to be their "direct purchaser"—

presumably informed by their estimation of which party was less likely to sue.

Nothing in those scenarios turns on which party sets the price for the products. If the retailer is a monopolist and the manufacturer faces a competitive market, the price paid by the consumer will be the manufacturer's marginal cost ($10) plus the amount that reflects the retailer's monopoly power ($3)—$13 total. The retailer would be free to structure the transaction so that either the manufacturer or the retailer would set the price. The retailer could buy the product from the manufacturer for $10 and set the retail price at $13. Or the retailer could sell "distribution services" to the manufacturer for $3, in which case the manufacturer would set the price at $13 to cover its cost. The economic substance would be identical; once again, the only difference would be how the transaction is characterized.

Indeed, under petitioner's proposed expansion of *Illinois Brick*, if a distributor sold goods subject to a resale price maintenance agreement (an agreement "under which manufacturers or suppliers set the minimum resale prices to be charged by their distributors," *State Oil Co.* v. *Khan*, 522 U.S. 3, 11 (1997)), the distributor could escape liability to its customers by arguing that the customers are indirect purchasers because someone else (the manufacturer or supplier) set the price for the goods. Petitioner's rule thus incentivizes the use of potentially anticompetitive agreements as a means to evade liability. See *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 892 (2007) (explaining potential anticompetitive effects of resale price maintenance agreements).

Perhaps a court would reject such obvious evasions, even under petitioner's theory, in the context of a tradi-

tional distribution chain. But the opportunities for manipulation are greatly enhanced in the context of more complex two-sided markets like the one petitioner claims to exist here. See Pet. Br. 35. Apple sells distribution services to developers, and it sells apps to consumers. If Apple can reclassify parties as direct or indirect purchasers based simply on how it chooses to characterize the transaction and structure the price-setting process, it will have every incentive to structure the transaction in a way that impedes private enforcement of the antitrust laws.

The traditional bright-line "direct purchaser" rule avoids those problems. The relationship between consumers and Apple bears all the indicia of a traditional direct-purchaser relationship. Consumers "enter" (*i.e.*, open and browse through) Apple's retail store, which is entirely controlled by Apple, not app developers. Apple collects products obtained from manufacturers (*i.e.*, app developers) and displays them in a manner that enables consumers to compare and evaluate them. Apple then administers the transaction with the consumer, collecting money and "delivering" (*i.e.*, giving access to) the product. The transaction is governed by a legally enforceable contract between Apple and the consumer. Respondents thus directly transact with Apple and are "direct purchasers" under *Illinois Brick*.

III. THE RATIONALES UNDERLYING *ILLINOIS BRICK* DO NOT SUPPORT ITS FURTHER EXPANSION

While expanding *Illinois Brick* as petitioner proposes would seriously impair enforcement of the antitrust laws, it would do little to advance the purposes of the doctrine. The rationales underlying *Illinois Brick* have eroded in the four decades since the case was decided. They do not support its further expansion. See *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)

(doctrine undermined by subsequent developments should not be expanded).

A. State-Law Antitrust Litigation Has Largely Eliminated Many of the Benefits *Illinois Brick* Was Intended To Provide

Illinois Brick sought to "eliminate the complications of apportioning overcharges between direct and indirect purchasers" and to "eliminate multiple recoveries." *Kansas* v. *UtiliCorp United Inc.*, 497 U.S. 199, 208, 212 (1990). Since *Illinois Brick* was decided, however, developments in state antitrust laws have fundamentally altered the antitrust landscape.

In the years following *Illinois Brick*, many States "began passing *Illinois Brick* 'repealers'—that is, statutes that specifically authorize[] indirect purchasers to recover damages under state antitrust laws." Antitrust Modernization Comm'n, *Report and Recommendations* 268 (Apr. 2007) ("*AMC Report*"); see, *e.g.*, Cal. Bus. & Prof. Code § 16750(a). In other States, courts interpreted existing laws to reach the same result. See *AMC Report*, *supra*, at 268-269. Today, "more than two-thirds of the States have authorized the use of pass-on analysis to apportion damages under their own antitrust laws." U.S. Br. 18. Litigation under those laws "has become increasingly common, especially since the mid-1990s." *AMC Report*, *supra*, at 269.

Some state-law antitrust suits remain in state court. But many are litigated in federal court through diversity or supplemental jurisdiction, particularly since Congress enacted the Class Action Fairness Act of 2005. See 28 U.S.C. § 1332(d); see also, *e.g.*, *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997) (Alabama-law indirect purchaser action removed to federal court on basis of diversity jurisdiction).

Accordingly, "federal courts now regularly entertain * * * issues involving passing-on under state law, which they are precluded from hearing under federal law by *Illinois Brick*." Edward D. Cavanagh, Illinois Brick: *A Look Back and a Look Ahead*, 17 Loy. Consumer L. Rev. 1, 2 (2004).

Petitioner's proposed expansion of *Illinois Brick* would thus do little to advance the doctrine's rationale. Even if this Court accepts the argument that Apple's customers are indirect purchasers (despite purchasing directly from Apple), the majority of those customers would still have equivalent remedies under state law, and many of those disputes would wind up in federal court regardless. The expansion that petitioner seeks would thus do little to relieve federal courts of supposedly complex apportionment issues and purported problems of duplicative recovery.

If anything, expanding *Illinois Brick* would *exacerbate* the problems this Court sought to mitigate. Such an expansion would further increase the wedge between federal and state law. The result would be an *increase* in complexity. See Gavil, *supra*, at 188 (differences between state and federal standing rules increase complexity). That would hardly serve this Court's goal of keeping antitrust litigation "within judicially manageable limits." *Associated Gen. Contractors of Cal.* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 543 (1983).

B. Courts Are Now Well-Equipped To Address Damages-Allocation Problems

At the same time state law has evolved to erode *Illinois Brick*'s asserted benefits, economic analysis has advanced to eliminate many of the complications this Court perceived. Fifty years ago, this Court wrote that determining the effects of a monopolistic overcharge at differ-

ent levels of a distribution chain was a "task [that] would normally prove insurmountable." *Hanover Shoe*, 392 U.S. at 493. The same concern drove the holding nine years later in *Illinois Brick*. See 431 U.S. at 725 n.3, 731-732. But economic analysis has far advanced in the years since. For that reason too, the Court should not expand *Illinois Brick* as petitioner urges.

The Court was concerned in *Illinois Brick* that computing passed-on overcharges would require assessing demand and supply elasticities in combination with a host of complicated variables influencing pricing decisions. See 431 U.S. at 741-743. But "that is not the typical way in which passed-on damages are computed in litigation." 2A Areeda & Hovenkamp, *supra*, ¶346k, at 219. Experts typically calculate overcharges using the "generally accepted" "yardstick" or "before-and-after" methods. *Conwood Co.* v. *U.S. Tobacco Co.*, 290 F.3d 768, 793 (6th Cir. 2002); see, *e.g.*, *Eleven Line, Inc.* v. *N. Tex. State Soccer Ass'n*, 213 F.3d 198, 207 (5th Cir. 2000) ("[T]he two most common methods of quantifying antitrust damages are the 'before and after' and 'yardstick' measures."); see also 11 Kintner & Bauer, *supra*, §79.1, at 107-108 (describing both methods). The "yardstick" method compares prices paid by the plaintiff to prices paid by a comparable firm unaffected by the antitrust violation. See 2A Areeda & Hovenkamp, *supra*, ¶392f, at 383-384; 11 Kintner & Bauer, *supra*, §79.1, at 108-109 & nn.80-81 (collecting cases). The "before-and-after" method compares the plaintiff's prices paid before and after the monopolization or price-fixing activity. See 2A Areeda & Hovenkamp, *supra*, ¶392e, at 382-383; 11 Kintner & Bauer, *supra*, §79.1, at 107 & nn.76-78 (collecting cases). Those methods permit computation of the price the plaintiff would have paid but for the anticompetitive conduct "without

reference to the amount 'passed on' by the intermediary." 2A Areeda & Hovenkamp, *supra*, ¶346k, at 220-221; see also Richman & Murray, *supra*, at 98; Blair & Harrison, *supra*, at 29.

State courts have relied on economic analyses based on those methods to certify indirect-purchaser classes despite arguments that calculating damages would be too difficult. See, *e.g.*, *In re Fla. Microsoft Antitrust Litig.*, No. 99-27340, 2002 WL 31423620, at *8-10 (Fla. Cir. Ct. Aug. 26, 2002) (yardstick analysis would permit reasonable estimate of indirect-purchaser damages); *Gordon* v. *Microsoft Corp.*, No. 00-5994, 2001 WL 366432, at *11-12 (Minn. Dist. Ct. Mar. 30, 2001) (similar). A "large majority of courts considering the issue" have rejected "pass-through and overcharge arguments" against class certification. *In re S.D. Microsoft Antitrust Litig.*, 657 N.W.2d 668, 679 (S.D. 2003) (collecting cases).

There is now a broad consensus in the literature that standard econometric methods are fully capable of allocating damages among multiple parties injured by a single antitrust violation. See, *e.g.*, Jan Boone & Wieland Müller, *The Distribution of Harm in Price-Fixing Cases*, 30 Int'l J. Indus. Org. 265, 273-274 (2012) (developing framework for apportioning harm due to price-fixing); Leonardo J. Basso & Thomas W. Ross, *Measuring the True Harm from Price-Fixing to Both Direct and Indirect Purchasers*, 58 J. Indus. Econ. 895, 920 (2010) (outlining statistical method as an "alternative to actually trying to estimate the degree of pass-through and the subsequent harm further downstream"); Frank Verboven & Theon van Dijk, *Cartel Damages Claims and the Passing-On Defense*, 57 J. Indus. Econ. 457, 481-483

(2009) (applying model to 1980s and 1990s European vitamin cartel).[6]

Courts and scholars have thus "developed a sophisticated body of law and economic thought on the problem of computing downstream overcharges," albeit "primarily in state, rather than federal, antitrust cases." Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and* Illinois Brick, 100 Iowa L. Rev. 2115, 2119-2120 (2015). Courts have "exhibited a capacity to handle suits from indirect purchasers and to calculate pass-on damages." Richman & Murray, *supra*, at 99.

Courts and economists are similarly capable of estimating damages in a case like this. While this case would require the calculation of the harm caused to a *direct* purchaser on one side of a two-sided market, rather than the harm caused to an indirect purchaser in a distribution chain, the econometric methods developed to address the latter problem are more than adequate to address the former. For that reason as well, the complications the Court perceived in *Illinois Brick* are no justification for expanding the doctrine to cover various categories of direct purchasers.

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[6] See also Martijn A. Han, Maarten P. Schinkel & Jan Tuinstra, *The Overcharge as a Measure for Antitrust Damages* (Amsterdam Ctr. for Law & Econ., Working Paper No. 2008-08, 2008) (concluding that courts need not calculate and apportion direct-purchaser overcharges and that more accurate damage calculations can be derived through but-for economic analysis); Martin Hellwig, *Private Damage Claims and the Passing-On Defense in Horizontal Price-Fixing Cases: An Economist's Perspective* 26 (Max Planck Inst. for Research on Collective Goods, Working Paper No. 2006-22, Sept. 2006) (arguing that "the passing-on defense is actually irrelevant to a proper assessment of damages").

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted.

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